Nos. 19745, 19761, and 21099

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19745

ELY VALLEY MINES, INC., PIOCHE MINES CONSOLIDATED, INC., and JOHN JANNEY,

Appellants,

vs.

LAWRENCE RUST LEE, HELEN DOLMAN, E.P.R. DUVAL, KATHERINE HANSBROUGH and JAMES KEITH MARSHALL, JR.,

Appellees.

No. 19761 and No. 21099

ELY VALLEY MINES, INC., PIOCHE MINES CONSOLIDATED, INC., and JOHN JANNEY,

Appellants,

vs.

AMERICO L. CAMPINI, SULLIVAN, ROCHE, JOHNSON and FARRAHER, THEODORE A. KALB, GERALD J. O'CONNOR, JAMES FARRAHER and ROGER T. FOLEY,

Appellees.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

Jurisdiction.

Jurisdiction of this action is based solely upon United States Code Annotated, Title 28, Section 1332:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between:
>
> "(1) Citizens of different states . . ."
>
> 28 United States Code Annotated, Section 1332.

The amended complaint sets forth that appellee Helen Dolman is a resident and citizen of the State of California; that appellee Lawrence Rust Lee is a resident and citizen of the State of Virginia; that appellee E.P.R. Duval is a resident and citizen of the State of Arkansas; appellee James Keith Marshall, Jr. is a resident and citizen of the State of Virginia and appellee Katherine Hansbrough is a resident and citizen of the State of Virginia. Said amended complaint further alleges that defendants Ely Valley Mines, Inc., a corporation, defendant Pioche Mines Consolidated, Inc., a corporation, and John Janney, are Nevada corporations and residents, respectively.

The amended complaint further avers that the corporate properties of Ely Valley Mines, Inc. have a value in excess of $2,000,000.00 and seeks damages of $1,000,000.00 against John Janney.[1]

After No. 311 was at issue on the original complaint, appellee Helen Dolman was granted leave to amend her complaint. The order granting said leave was filed in the District Court on June 6, 1961. No responsive pleadings were filed to the amended complaint until after the decision in appeal No. 17,709 was rendered. The answer and counterclaims of Ely Valley and Pioche Mines were filed August 21, 1964 [Tr. 91]. Upon oral motion, the District Court ordered, on August 25, 1964, that the answer and counterclaim be stricken. The appeal from this order is No. 19745.

On October 5, 1964 Notice of Appeal was filed from a Restraining Order issued against John Janney. This

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[1]This Court in appeal No. 17,709, cited as 337 F. 2d 257, (1964), awarded Pioche Mines Consolidated judgment in the amount of $1,000,000.00 against John Janney. This appeal arises out of the same action, No. 311 in the District Court of the State of Nevada.

is appeal No. 19761. Appellate jurisdiction for an appeal from this Order is granted by *United States Code Annotated, Section 1292(a)(1).*

On November 23, 1964, there was filed "Judgment and Orders After Appeal." The same were docketed on November 30, 1964. A Motion to Alter or Amend the above order was docketed on December 7, 1964. This motion was denied on June 25, 1965, on the grounds that the motion was not timely filed. Notice of appeal from this order was docketed on the 28th day of June, 1965. Jurisdiction to hear this appeal is granted by *28 United States Code Annotated, Section 1291.* This is appeal No. 21099.

On January 11, 1965 Ely Valley Mines filed its Motion to Re-Tax Costs. On June 21, 1965 the motion was denied. Notice of appeal from the order of denial was filed on June 28, 1965. Jurisdiction to entertain this appeal is granted by *28 United States Code Annotated, Section 1291.* This is also appeal No. 21099.

On the 28th day of December, 1964 this Court ordered that all of the appeals be consolidated for the purposes of briefing and argument. On the 10th day of August, 1966 this Court denied appellees' motion to dismiss. Therefore, this Court has jurisdiction.

Statement of the Case.

The four appeals herein consolidated all arise out of proceedings taken in the United States District Court for the District of Nevada subsequent to this Court's decision and mandate rendered in Case No. 17,709; 337 F. 2d 257 (1964). The Court, in No. 17,709 (333 F. 2d at 276), made a twelve-paragraph order and remanded the matter to the trial court with directions (337 F. 2d 257, 277, 278). Appellants take issue with

various rulings made by the trial court in its attempt to carry out the mandate of this Court.

This case involves properties which at the time of the filing of the original complaint on February 2, 1960, were alleged to be worth a sum in excess of $2,-000,000.00 [Tr. 41, No. 17,709], and although six years have elapsed during which time "a veritable blizzard of motions and papers" has plagued the Court (333 F. 2d 257, 260), the property still lies dormant and unproductive to the detriment of all parties directly involved in the litigation; to the economic loss of the residents of the geographical region wherein the mines are situate; and, to say the least, to the understandable vexation and test of patience borne by the judiciary.

Without seeking to cast blame on the one hand, or to stand before the Court in a posture of abject apology on the other, but rather in an unemotional, legalistic and objective attempt to be of assistance in settling the law and facts of this issue, appellants show unto the Court as follows:

The four appeals, for the sake of both brevity and convenience, will be denominated by the following appellations, and will be taken up in the order of their nomenclature, rather than in the order of their dates in the Civil Docket or in the order of importance to which appellants might subscribe to them:

1. The Order Striking the Answers and Counterclaims;
2. The Restraining Order;
3. The Order Denying the Motion to Alter or Amend;
4. Ely Valley's costs.

I.

The Order Striking the Answers and Counterclaims.

This Court in *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F. 2d 257, at page 277, in paragraph 4, directed that "the order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims". The mandate [Tr. 3] directed:

> "The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed. The order entering the defaults of these two corporations is reversed. The court is directed to reinstate their counterclaims."

The trial court's order in this regard read as follows:

> "2. That that part of said judgment heretofore entered by this Court on October 8, 1962, against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is hereby vacated and set aside, and the counterclaims filed on April 4, 1960, on behalf of said corporations be, and the same hereby are reinstated."

It is to be noted that at the time of the appeal in No. 17,709, *Pioche Mines Consolidated v. Dolman (supra),* the basic pleadings on file were the complaint, answer and counterclaims on behalf of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc.; answer and counterclaim on behalf of John Janney; Reply by Plaintiff Helen Dolman; and an amended complaint on behalf of Helen Dolman, Lawrence Rust Lee, *et al. There was no answer on file in response to the amended complaint* (italics added), and none has been allowed because the lower court struck the answers to the amended

complaint and the counterclaims of the defendants which accompanied the answers [Tr. 126]. This action by the trial court was done pursuant to an *ex parte* oral motion by appellees (Civ. Docket 18), thirteen days after the Circuit Court of Appeals Judgment was filed, which was August 11, 1964.

On August 25, 1964, the civil docket (p. 18) reflects the following proceedings: "With Mr. Horton seated in the rear of the courtroom, and Mr. Janney at counsel table, the Court states that it wants to reconsider the motion of Mr. O'Connor to strike the Answer of Defendants to amended complaint and counterclaims filed August 21, 1964. Mr. O'Connor restates his motion to strike previously made yesterday and the grounds therefor. The Court reviews the motion and various citations and reaffirms the order made yesterday striking the aforesaid answer and counterclaims. Mr. O'Connor presents a written order which is signed and filed."

The written order [Tr. 126] adopted as a basis for dismissing the answer, as distinguished from the counterclaims, the following two grounds [Tr. 126]:

> "1. That there is no order of this court permitting the filing of such document and that such document may not be filed without such order;
>
> "2. That there is no motion before this court to permit the filing of such document;"

The remaining nine grounds for the dismissal have only to do with the counterclaims in response to the amended complaint, and appellants concede that the motions to dismiss the counterclaims have merit and therefore abandon the counterclaims on this appeal. However, appellants submit that the answers themselves

were stricken without legal justification and appellants do urgently seek a reversal as to that portion of the lower court's order. Upon reversal the original counterclaims will stand submitted and the case will be at issue, ready for trial setting.

II.

The Restraining Order.

In *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F. 2d 257, at 277, this Court ordered the trial court:

> "To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. to them, and upon the settlement of his accounts and the completion of his duties discharge him."

In 13(b), page 277, this Court further ordered:

> ". . . That the action be dismissed as against Ely Valley Mines, Inc. . . ."

Paragraph 5, page 277, states:

> "The orders of December 16, 1961, January 24, 1962 and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed."

As previously noted, the above judgment was docketed in the District Court and counsel was so notified on the 11th day of August, 1964 (Civ. Docket 17).

Despite the plain and explicit wording of the above orders, the receiver filed on September 3, 1964 as affidavit, to the effect that he was performing certain assessment work on the mines and that John Janney and his agents were attempting to seize possession of the mining claims owned by the two appellant corporations. Based upon this affidavit the court ordered on September 3, 1964, that John Janney, and his agents, be restrained from attempting to occupy, possess, or in any way exert dominion or control over the properties of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. This order was made *ex parte*. Appellants contend that the court abused its discretion in issuing a restraining order without notice and in disregard of this Court's mandate.

III.

The Order Denying the Motion to Alter or Amend the Judgment.

The trial court entered its Judgment and Orders After Appeal on November 20, 1964. It was docketed November 30, 1964 (Civ. Docket 22). A reading of the Civil Docket fails to show that a Notice of Entry of Judgment was served on appellant or their counsel. On December 7, 1964 appellants filed their Motion to Alter or Amend Judgment. The motion was denied on June 23, 1965. The Court found:

> "That the Judgment and Order After Appeal was made and entered on November 23, 1964; this court further finds that, the said Motion to Alter or Amend Judgment was filed herein December 7, 1964; this court further finds that, pursuant to Rule 59 of the Federal Rules of Civil Procedure,

said Motion to Alter or Amend Judgment was required to be filed within ten (10) days from date of entry of said order.

"It Is, Therefore, Ordered, that the said Motion to Alter or Amend Judgment be, and the same is, hereby denied upon the ground that the said Motion was not timely served and filed."

The question presented, therefore, is whether or not time starts to run from the date of filing or the date of docketing. In other words, is the date of entry the date of filing or is it the date of notation in the Civil Docket?

IV.

Ely Valley's Costs.

On January 6, 1965 Ely Valley Mines filed its Memorandum of Costs and Disbursements in the sum of $5,324.86. The clerk of the court, on January 6, 1965, taxed them at the figure set forth in the memorandum. On the same day appellees filed their objections to the cost bill, and on January 11, 1965 filed a motion to retax costs. On June 23, 1965 the cost bill was denied, the court finding and ordering:

"that the judgment authorizing recovery of costs was made and entered on November 23, 1964, in that certain order entitled 'Judgment and Orders After Appeal';

"This Court Further Finds that, pursuant to Rule 18(a) of the Rules of Practice of the United States District Court for the District of Nevada, said Memorandum of Ely Valley Mines, Inc., Of Costs and Disbursements was required to be filed in no event more than five (5) days *after notice of entry of decree.*" (Italics ours).

> *"This Court Further Finds that notice of entry of said decree was given no later than November 30, 1964."* (Italics ours).
>
> "IT IS, THEREFORE, ORDERED that said Memorandum of Ely Valley Mines, Inc., Of Costs and Disbursements be, and the same is, hereby denied upon the ground that the same was not timely served and filed. The Clerk of this Court is directed to enter an order denying recovery of such costs."

Rule 18(a) of the Rules of Practice, United States District Court for the District of Nevada, does indeed state, as found by the Court:

> "The party in whose favor a judgment or decree for costs is awarded or allowed by law, and who claims his costs, shall, after verdict, or after the making of an order for judgment or decree, serve on the attorney for the adverse party and file with the clerk (such service and filing in no event to be later than five days *after notice of the entry of the decree or judgment*) his bill of costs and disbursements, . . ." (italics ours).

Appellants quarrel with the finding that "Notice of Entry of Judgment was given no later than November 30, 1964." As the record shows, this Order was prepared in the office of Alvin N. Wartman, Attorney at Law, Suite 10, Cornet Building, 401 Fremont Street, Las Vegas, Nevada. The Civil Docket is devoid of a notation showing entry and service of any Notice of Entry of Judgment. Therefore, the question to be decided is whether or not a Notice of Entry of Judgment was filed

and served, and, if not, when does time for filing a cost bill begin to run. While this point might be classed as a technical one, yet a reading of all the various post judgment motions and objections filed by appellees cannot but leave the reader with the inescapable conclusion that a course of purposeful delay and obstruction has been pursued by appellees in the form of raising every conceivable objection to the carrying out of this Court's mandate. Hence, appellants trust they will be forgiven for requesting this Court to require appellees to adhere to the strict letter of the rules as well as to invoke them. In short, "he who lives by the sword shall die by the sword."

Statement of Facts.

The questions presented, as the reader has already undoubtedly gathered, relate almost exclusively to procedural matters, and, therefore, a statement of facts is really not essential to an understanding of this appeal. The facts underlying the case in chief are lengthy and complex and will in all probability be before this court at some future date. Until that time, it behooves appellants to spare the Court the burdensome task of wading through the reams of material involved in this case and its companion.

Suffice it to say that the action was instituted in the year of 1940 by Appellee, Helen Dolman, who alleged that she was bringing the action for herself as an individual and as a stockholder of appellant corporations. This pleading was found defective and was amended by the insertion of additional named parties plaintiff. Prior

to the filing of answers to the amended complaint, default judgment was entered, and an appeal was taken therefrom which is No. 17,709, *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F. 2d 257 (1964). The matters before the Court on this appeal all stem from differences arising from the interpretations placed on that decision by the various parties, and their attempts to carry out its provisions, the pertinent portions of which are as follows:

1. Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, are dismissed.
2. Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc. a corporation, as the party in whose favor that part of the judgment is entered.
3. The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed.
4. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims.
5. The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.
6. The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

7. The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

8. That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

9. That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. or of Ely Valley Mines, Inc., is affirmed.

10. Subparagraph 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of paragraph VIII are reversed and remanded. The court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

11. Plaintiffs may recover their taxable costs in the trial court from appellant John Janney, but no other costs or expenses.
12. The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.
13. The matter is remanded to the trial court with directions
    a. To modify the judgment in the manner hereinabove ordered.
    b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.
    c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.
    d. To take all other actions necessary to carry out the foregoing orders, and such further proceedings as shall be consistent with this opinion.

14. Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

Specifications of Error Upon Which Appellants Rely.

1. The Order Striking the Answer was in Error because:

(a) The Mandate of the Court of Appeals set aside the default of the corporations, thereby permitting the filing of a responsive pleading.

(b) Where dismissal is granted, it should be with leave to amend.

(c) The Court must allow an answer to be filed, if it is responsive and within the rules.

(d) The defense that the complaint fails to state a claim upon which relief can be granted may be interposed by answer with equal validity and effect as if made by motion and must be heard.

2. The Court Erred in Allowing the Restraining Order of September 3, 1964.

(a) The Court allowed injunctive relief at the prayer of a person no longer a party to the proceedings.

(b) No Notice was given.

(c) There was no showing of great, lasting, or irreparable injury.

(d) The Court failed to follow the plain dictates of Rule 65 Federal Rules of Civil Procedure.

3. The Court Erred in Denying the Appellants Motion to Alter or Amend the Judgment filed December 7, 1964.

(a) The Court erred in finding that the time for filing the motion commenced to run on November 23, 1964.

(b) The Court should have found that the time for filing the motion commenced to run from the date the motion was noted in the Civil Trial Docket, namely, November 30, 1964.

4. The Court Erred in denying Ely Valley Mines' cost bill.

(a) The plain wording of Rule 18(a) of the Rules of Practice, United States District Court For The District of Nevada, allows the cost bill to be filed five (5) days after notice of entry of judgment.

(b) The Court erred in finding that "Notice of Entry of Judgment was given no later than November 30, 1964."

POINTS, AUTHORITIES AND ARGUMENT.

I.

The Order Striking the Answer and Counterclaims.

Appellants substituted counsel on this appeal, not having participated in the prior proceedings in this matter, is in somewhat the same position as the reviewing court in that he is afforded the opportunity to take a completely objective view of the case, and submit his brief on the matter unburdened by the subjective difficulties inherent in the conduct of all litigation. In this vein, and without in any way meaning an intendment of criticism against any person, appellants concede that the lower court was justified in striking the counterclaims. Those reinstated by the opinion of the Appellate Court raise issues upon which appellants can gain the relief they seek and all sufficient.

The motion to strike, while inappropriate, was properly treated as a motion to dismiss.

Federal Rules of Civil Procedure, Rule 12.

Where an answer as well as a reply have been served, a motion to strike can be considered as a motion to dismiss. *F. E. Myers & Bros. Co. v. Guilds Pumps,* (D.C.N.Y. 1946), 5 F.R.D. 132.

Granting the propriety of the lower court's action in dismissing the counterclaims, it did commit error in dismissing the answer. The answer [Tr. 91] consists of six stated defenses, among which, the fifth, is that the complaint fails to state a claim upon which relief can be granted. Taken as a whole, they controvert the allegations of the complaint, and are sufficient to put the case at issue.

Federal Rules of Civil Procedure, Rule 15(a).

Federal Rules of Civil Procedure, Rule 7 provides a simple and elastic procedure concerning pleadings without too much emphasis as to form. *Ranghley v. Pennsylvania R. Co.* (C.A. 3d, 1956), 230 F. 2d 387.

The purpose of pleading under the rules is to give notice of what an adverse party may expect to meet rather than to frame issues. *Kellogg Co. v. National Biscuit Co.* (D.C.N.J. 1941), 38 Fed. Supp. 643.

An answer is sufficient if it is definite enough to inform the adverse party of the issues be must be prepared to meet. *Fontes v. Porter* (C.C.A. 9th, 1946), 156 F. 2d 956.

A motion to strike will not be granted if the insufficiency of the defense is not clearly apparent or may better be determined upon a hearing on the merits. *Smith v. Piper Aircraft Corp.* (D.C. Pa. 1955), 18 F.R.D. 169, 177.

Striking a pleading is a drastic remedy to be resorted to only for purposes of justice, and should be sparingly used by a court. *Brown & Williamson Tobacco Corp. v. U. S.* (C.A. 6th), 201 F. 2d 819.

A motion to strike a defense for insufficiency should be granted, if at all, with leave to amend. *Morgan v. Duro Paper Bag Mfg. Co.* (D.C. Ind. 1957), 22 F.R.D. 598.

Appellants submit that in view of the foregoing authorities the learned trial Judge erred in striking appellants' answer.

II.

The Restraining Order.

The lower court issued a restraining order based upon the affidavit of the receiver and without notice. The court will recall that its decision in *Pioche Mines Consolidated (supra)* vacated the trial court's order appointing the receiver and dismissed the complaint as to Ely Valley Mines, Inc. The sole and remaining function of the receiver after the appellate court's decision was to render an accounting. He had no standing after the rendition of the decision to appear before the court, other than to account. He was totally and absolutely stripped of any authority to exercise any dominion or control over the corporations' properties, and this is especially true of Ely Valley Mines, Inc., because the action was dismissed as to it. Therefore, the receiver had no more business in seeking injunctive relief than a total stranger would have had.

The classic principles governing the availability of injunctions were clearly set forth as far back as 1830 in the case of *Bonaparte v. Camden,* C.C.N.J., Fed. Cas. No. 1617, and the principles therein set forth are as true and binding now as they were at that time:

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate

> remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act."

The word "notice" in Rule 65(a) implies the right to a hearing, and such a hearing usually will be required. *Sims v. Greene* (C.C.A. 3rd, 1947), 161 F. 2d 87.

While it could be successfully argued that the injunction expired within 10 days under *Federal Rules of Civil Procedure, Rule 65(6),* and the question is now moot, nevertheless appellants are entitled to have the record set straight in this particular. Expecially so, since the trial judge is apparently of a different opinion. Therefore, it is submitted that the matter be clarified so all concerned will be fully aware that Ely Valley Mines, Inc. is in the same position as if a claim had never been filed against it.

III.

Order Denying the Motion to Alter or Amend the Judgment.

It will be recalled that the trial court found that the Judgment was entered November 23, 1964, and therefore ruled that the Motion filed December 7, 1964 was untimely in that it did not meet the ten-day requirement of *Federal Rules of Civil Procedure, Rule 58.* However, counsel for Appellees who drew the Order entirely disregarded *Federal Rules of Civil Procedure, Rule 58,* That Rule specifically provides:

> "The notation of Judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

Therefore, it is plain to see that time did not start to run until November 30, 1964, which is the date of the notation of the order in the civil docket.

If a reading of the Rule is not sufficient to convince the Court on this point, the cases decided thereunder are as follows:

Greenwood v. Greenwood, 234 F. 2d 276, 278, which holds that pursuant to Rule 58, the notation of the Judgment on the docket as provided by Rule 79(a) constitutes the entry of the Judgment and the Judgment is not effective before that date.

See also: *Neely v. Merchants Trust Co. of Red Bank, N. J., et al.* (C.C.A. 3rd, 1940), in which the facts are as follows: A final decree was filed and marked filed on January 20, 1939. It was received by the Clerk either on January 21st or January 23rd, and was entered by a Deputy Clerk in the civil docket on January

23, 1939. The Court ruled specifically that the date of entry was January 23rd and not January 20th, and that the running of time commenced on the date that it was noted in the civil docket.

It is submitted that no further showing need be had to justify a reversal on this point.

IV.

Motion to Re-Tax Costs.

This Motion also was denied by the lower Court on the ground that it was not timely filed. This Court can very easily find and rule that the time for filing the cost bill is not governed by the same rules as are applicable to the filing of a cost bill after judgment or decree in the District Court. However, such a ruling is not necessary in the opinion of this writer because of the fact that no entry of judgment was entered herein and has not been entered as of the date of this brief. It is elementary that time does not start to run until the date of entry of Judgment.

> See *Federal Rules of Civil Procedure, Rule 73(a).*

Therefore, if this Court should decide to be literal on this point, it could in actuality rule that the time has not as yet commenced to run for the filing of the cost bill. However, it is submitted that such a strict interpretation of the rules is not at all necessary but on the other hand, there has been no prejudice to appellees whose duty it was to file the notice of entry and therefore they should not be held to complain on any technical ground, and that the cost bill should be determined on its merits, as should all the other matters herein on appeal.

Conclusion.

It is apparent to substituted chief counsel, after a prolonged search through the voluminous records in this case that tempers flared and emotions overcame reason, and understandably so. Having had a long and pleasant relationship with the learned trial judge, this counsel is of the certain opinion that had he had the temerity to file certain pleadings herein, both the Judge's wit and love of the law would have reasserted itself within time for rehearing. Unfortunately, however, counsel did not have the opportunity to correct these matters and regrets that this Court must be burdened to do so. Counsel is also certain that the learned trial judge is as anxious to have this matter heard on its merits as are appellants, and counsel can represent to this Court that as soon as is possible after the ruling herein to be handed down by this Court, that the matter will finally, after six long years, be heard on its merits and correctly determined.

Dated September 2, 1966.

Respectfully submitted,

JOHN PETER LEE,
MORSE & GRAVES,
Attorneys for Appellants, Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. and John Janney.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOHN PETER LEE